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CHARLES ELMORE CROPLEY
CLERK

No. 381

In The

SUPREME COURT OF THE UNITED STATES

GAULEY-EAGLE COAL AND COKE COMPANY,
Petitioner,

v.

T. J. BLAIR, Jr., J. N. BERTHY, Jr., and JOHN L. DICKINSON,
Respondents.

Petition for Writ of Certiorari Directed to the Supreme Court of Appeals of West Virginia

BROOKS B. CALLAGHAN,
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PETITION FOR WRIT OF CERTIORARI

To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Gauley-Eagle Coal and Coke Company, a West Virginia corporation, respectfully shows as follows:

I

SUMMARY STATEMENT OF THE MATTERS INVOLVED

ASSIGNMENT OF ERRORS

A writ of certiorari is sought in order to give this Court an opportunity to review the record in this case and correct errors in the final decision and decree of the Supreme Court of Appeals of West Virginia filed and entered herein

on June 21, 1949, with petition for rehearing denied on July 28, 1949.

The error chiefly complained of on this application is that the State appellate court, by its above decree, cancelled, set aside and held for naught this petitioner's coal-operating lease of June 21, 1947, upon the undivided two-thirds interest of the plaintiffs T. J. Blair, Jr. and J. N. Berthy, Jr., in a tract of 4700 acres—without any pleading, prayer, request, issue or evidence for such holding, and although all parties had conceded such lease upon such interest, and although the court itself had confirmed the same throughout its written opinion until the last paragraph where it ordered partition of the 11,000 acre tract, of which the 4700 acres is a part, "free of the alleged lease on a tract of 4700 acres thereof" (thus cancelling petitioner's unquestioned lease upon the two-thirds interest of Blair and Berthy)—thus taking this petitioner's property without notice or opportunity to be heard on that subject, in violation of the Fourteenth Amendment to the Constitution of the United States relating to due process of law.

NATURE OF CASE AND RULINGS

This suit in chancery was instituted August 22, 1947, (Summons, R-12) in the Circuit Court of Nicholas County, West Virginia, for the purpose of obtaining partition of a tract of 11,000 acres of land, in fee, located in that County. The plaintiffs, T. J. Blair, Jr. and J. N. Berthy, Jr., each owned an undivided one-third interest, and the defendant John L. Dickinson likewise owned an undivided one-third interest (Bill, R-13, 96). This petitioner was joined as a

party defendant because of its interest as lessee in the 4700-acre southern portion of the 11,000 acre tract.

This petitioner filed its answer praying affirmative relief on October 7, 1947, having process issued and served, and alleging that the two plaintiffs and their respective wives had made, executed and delivered unto petitioner a coal-operating lease dated June 21, 1947, covering the plaintiffs' undivided two-thirds interest in the 4700 acres, exhibiting a copy (R-21 et seq.), and the original lease bearing the signatures was introduced in evidence (R-367). In the evidence Berthy (R-441) and Blair (R-505) testified to their execution of this lease. Neither the existence of this lease nor petitioner's estate thereunder was ever disputed or attacked by any of the parties thereto at any stage of the case.

Also petitioner's answer (R-21 et seq.) alleged that the defendant John L. Dickinson had likewise promised and agreed on his part to make, execute and deliver unto petitioner a like lease upon his undivided one-third interest in the same 4700 acres, alleged petitioner's possession and valuable improvements in reliance thereon, and Dickinson's wrongful refusal to perform, and prayed for specific performance of that contract and for full protection of its interests in the property upon any partition. And for the protection of a lease in case of partition, W. Va. Code, Sec. 7, Art. 5, Chap. 37 provides:

> "Lessee.—Any person who, before the partition or sale, was lessee of any of the lands divided or sold, shall hold the same of him to whom such land

> is allotted or sold, on the same terms on which, by his lease, he held it before the partition."

Voluminous evidence was taken on the issue of specific performance of this contract for a lease on Dickinson's one-third interest. The trial court decreed specific performance (Opinion, R-108; Decree, R-115). Dickinson petitioned for and obtained an appeal to the Supreme Court of Appeals of West Virginia (R-1, 10).

On appeal, that court reversed the trial court on the issue of specific performance of the contract for the lease upon Dickinson's one-third interest. However, as to this petitioner's lease upon the two-thirds interest of Blair and Berthy, the court said and held (Opinion, R-.....):

> "After the breakdown in negotiations for a lease upon which all the owners could agree, they [Blair and Berthy] have felt that they could best protect their interests by the execution of the lease prepared by Callaghan at the instance of Gauley-Eagle. *At any rate, they did so, and their right to do so can not be questioned.*" (Emphasis supplied.)

And this holding was in accordance with established law, for in *Hamrick* v. *Nutter* (1925) 98 W. Va. 645, 127 S. E. 505, it was held, "a coal mining lease executed by one of several cotenants, while not binding on the others, is valid between the parties thereto".

And yet in the last paragraph of its opinion in the case here the court directed:

> ". . . the partition or sale of the 11,000 acre tract of land, described in the pleadings in this cause, *free of the alleged lease on a tract of 4700 acres thereof, set up herein* . . ." (Emphasis supplied.)

This holding not only denies specific performance as to the lease on the Dickinson one-third interest but also cancels and annuls the unquestioned lease on the Blair and Berthy two-thirds interest.

FEDERAL QUESTIONS—WHEN AND HOW RAISED AND RULED UPON

Believing at the time that the cancellation of the lease on the two-thirds interest was an oversight, especially since it was done without comment, discussion or reason in the opinion and done without any notice from the pleadings or evidence and after being unequivocally approved by the court itself, this petitioner filed its petition for rehearing, specifically and explicitly pointing out the taking of petitioner's property without due process, i. e. without any notice or opportunity to be heard—see Petition for Rehearing. But the court denied the petition on June 28, 1949.

This federal question was clearly raised by the assignment of the following point of error in the Petition for Rehearing:

> "1. The Court without due process of law cancelled, set aside and held for naught Gauley-Eagle Coal & Coke Company's written coal-operating lease of June 21, 1947, upon the undivided two-thirds interest of T. J. Blair, Jr. and J. N. Berthy, Jr. in the 4700 acre tract—without any pleading, prayer, request or evidence for such holding, and although all parties had conceded such lease on such interest, and although the Court itself had confirmed the

same throughout its opinion until the last paragraph where it ordered partition of the 11,000 acres 'free of the alleged lease on a tract of 4700 acres thereof' (thus cancelling petitioner's lease upon the unquestioned two-thirds interest of Blair and Berthy) —all in violation of both Constitutions (being the Fourteenth Amendment to the Constitution of the United States and Article III, Section 10, of the Constitution of West Virginia, which relate to the due process of law).

The petitioner's Brief in Support of Petition for Rehearing was even more explicit to the following effect:

"If this Court reads Gauley-Eagle's Petition for Rehearing and this supporting memoranda, it will see immediately grave errors involving due pocess, and, therefore, Federal Questions, which it will desire to have reviewed and to have corrected here and now, and not upon further appeal.

I

"The present decision takes from Gauley-Eagle its written, executed, acknowledged and delivered lease upon the undivided two-thirds interest of Blair and Berthy in the 4700 acres.

"That is the present holding. In the last paragraph, it orders partition of the 11,000 tract 'free of the alleged lease on a tract of 4700 acres thereof'—not just free of lease upon the one-third of John L. Dickinson therein, but all interests therein, including the two-thirds of Blair and Berthy.

"This Court has no jurisdiction to make such a holding. Such holding is not supported by any pleading, prayer or evidence. In short, Gauley-Eagle had no notice and no opportunity to be heard

on that matter. This is a plain, pointed, conspicuous denial of due process.

"Furthermore, Gauley-Eagle's lease on the Blair and Berthy two-thirds interest was not only conceded by all parties, but also this Court in this opinion confirms that lease right down to the last paragraph, stating on page 32—'* * * they (Blair and Berthy) may have felt that they could best protect their interests by the execution of the lease prepared by Callaghan at the instance of Gauley Eagle. At any rate, *they did so, and their right to do so can not be questioned.*'

"Then without any stated grounds, reason or even discussion, this lease is cancelled and set aside in the last paragraph of the decision, and partition is ordered free of that lease."

The petitioner in its Petition for Rehearing also assigned another substantial error raising a federal question, but its presentation here would require some extended reference to the evidence and briefs, whereas the error and federal question referred to above are self-evident and, considered alone, would seem sufficient. However, to to comply with the rule of this court requiring all issues upon which decision is requested to be presented in the petition for certiorari, petitioner here refers to and incorporates into this petition the second point of error assigned in its Petition for Rehearing in the court below, included in the transcript herein, to the same effect as if herein set out in full.

JURISDICTIONAL STATEMENT

The jurisdiction of the Supreme Court of the United States upon certiorari is invoked under Section 237(b) of the Judicial Code (28 U. S. C. 344).

Cases sustaining the jurisdiction for allowing the writ and awarding review are all that line of cases holding that the federal question may be raised first on petition for rehearing, among which cases are the following:

Grannis v. *Ordean*, 234 U. S. 385, 58 L. Ed. 1363, 34 S. C. R. 779.

Coal Co. v. *Bd. of Revision*, 284 U. S. 23, 76 L. Ed. 146, 52 S. C. R. 48.

II

REASONS RELIED ON FOR GRANTING THE WRIT

That error exists is apparent. That the error is a violation of due process is also apparent.

That the decision of the lower court is not in accord with any decision of this Court, requiring notice and opportunity to be heard under the Due Process Clause, is clear.

That the question presented is substantial readily appears. In the first place, such a decision, standing as a precedent, would be a most dangerous innovation in a state such as West Virginia where coal-operating leases form such an integral part of its economic and social existence. Standing as a precedent, the present decision would also be a dangerous innovation in judicial procedure —if an appellate court may thus destroy or transfer property with no prior notice by any pleading or evidence and with the resulting lack of any opportunity for the interested party to be heard. Considered alone from the standpoint of financial interest to this petitioner, this is no

small matter. A coal lease upon 4700 acres with a guaranteed minimum royalty of $24,000 per year is a substantial property. In reliance upon the lease on the two-thirds interest of Blair and Berthy or upon the agreement therefor which was performed and in reliance upon what this petitioner and the trial court thought was an enforcible contract for a lease upon the one-third interest of Dickinson, this petitioner brought onto the property equipment valued at $450,000. (R-131), constructed railroad siding at an expense of $20,000. coal tipple at an expense of $85,000. and roads at an expense of $40,000. to $45,000. (R-332).

Since the federal question is so apparent and its substantial nature is likewise so apparent, the petitioner is of the opinion that a supporting brief would be surplusage and, therefore, waives its right to file such brief.

PRAYER

Wherefore your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of Appeals of West Virginia, commanding that court to certify and to send to this Court for review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; and that the decree of the Supreme Court of Appeals of West Virginia be reversed by this Honorable Court, and that your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

BROOKS B. CALLAGHAN,
Counsel for Petitioner.